Office-Supreme Court, U.S.
FILED
SEP 25 1964
JOHN F. DAVIS, CLERK

SUPREME COURT, U. S.

No. 536

IN THE

Supreme Court of the United States

October Term, 1964

ANDREW CLEVELAND ROGERS, III
AND
ANDREW CLEVELAND ROGERS, JR.,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RUSSELL H. VOLKEMA,
44 E. Broad St.,
Columbus 15, Ohio,
Attorney for Petitioners.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

INDEX

Opinions by courts below 1
Jurisdiction of this Court 2
Questions presented for review 2
Statutes involved 3
Statement of the case 3
Argument 6
Summary 6
Question No. 1 7
Question No. 2 15
Question No. 3 18
Conclusion—Writ of Certiorari should be granted. ... 21
Appendix A—Order of United States Court of Appeals 24

Cases Cited

Abdo et al. vs. Townsend et al., in Re: Talip et al., 282 F. 476 12

Bradshaw vs. Wilson, 87 O. App. 319, 94 N. E. 2d 707 (1950) 16

Davis vs. Memorial Hospital, 376 P. 2d 561 (1962) 17
Degelos vs. Fidelity & Casualty Co., 313 F. 2d 809, (5th Cir. 1963) 12
Dickson vs. U. S., 182 F. 2d 131, 133 12

Fall vs. Esso Standard Oil Co., 297 F. 2d 411, 417 13
Fay vs. United States, 22 F. R. D. 28 14
Fink vs. New York C. R. Co., 144 O. S. 1, 56 N. E. 2d 456, 459 15

Glowacki vs. N. W. Ohio Ry. & Power Co., 116 Ohio State 451 15

Hertz vs. Graham, 23 F. R. P. 17 (1958) 11
Horner vs. Northern Pac. Ben. Assn. Hospitals, 382 P. 2d 518 (1963) 16

J. E. Hanger, Inc. vs. U. S., 160 F. 2d 8 11
Jesionowski vs. Boston & Maine R. R. Co., 329 U. S. 452 17
Johnson vs. United States, 333 U. S. 46 17

Klop vs. United Fruit Co. et al., 18 F. R. D. 310 14

Moore vs. Belt, 34 Cal. 2d 525, 212 P. 2d 509 (1949) .. 16

Newark Ins. Co. vs. Sartain, 20 F. R. D. 583 14

Squire vs. Industrial Commission, 70 N. E. 2d 95, 101 .. 21
Steele vs. Randall, 19 F. 2d 40 13
Sweeney vs. Erving, 228 U. S. 233 17

U. S. v. Montgomery, 126 F. 2d 151, 153 12
U. S. v. Southerly portion of Bodie Island, 19 F. R. D. 313 11

Valentine vs. Kaiser Foundation Hospitals, 194 Cal. App. 2d 282, 15 Cal. Rptr. 26 (1961) 16

Authorities Cited

Federal Rule 43 (a) (b) 7, 10, 11, 12, 14
Ohio Revised Code, Section 2317.52 11
Federal Practice & Procedure, Volume 2B, 208, Section 961, Barron & Holtzoff 11
21 Ohio Jurisprudence 2d 441, Section 430 21
3 Wigmore 3d Edition, Sec. 779 12

IN THE

Supreme Court of the United States

October Term, 1964

No. .....

ANDREW CLEVELAND ROGERS, III
AND
ANDREW CLEVELAND ROGERS, JR.,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BY COURTS BELOW *

Petitioners, Andrew Cleveland Rogers, III and Andrew Cleveland Rogers, Jr., respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review the judgment and decision of that court in Case Number 15,424, entitled Andrew Cleveland Rogers III and Andrew Cleveland Rogers, Jr. vs. The United States of America, which was filed on July 24, 1964 (App. A-1) affirming the judgment of the United States

* Reference in this petition to "App. -a" and "App. -sa" is to the page numbers in the appendix and supplemental appendix, respectively, of plaintiffs-appellants in the Court of Appeals and "Ap. -b" is to the page number in the defendant-appellee's appendix in the Court of Appeals; reference to App. A.. is to the page number of the appendices to this petition; reference to App. O.. is to the page number of the Appellate Court's Opinion.

District Court for the Southern District of Ohio. The District Court filed its memorandum-decision as a separate finding of fact and conclusions of law (App. 123a) and entered judgment for the defendant (App. 142a).

JURISDICTION OF THIS COURT

The judgment of the United States Court of Appeals for the Sixth Circuit of which review is sought, is dated July 24, 1964 (App. A-1; App. O-1).

Jurisdiction of this Court to review the said judgment of the United States Court of Appeal for the Sixth Circuit by writ of certiorari is conferred upon this Court by the provisions of the Act June 25, 1948, c. 646, 62 Stat. 928; U. S. C. Title 28, Section 1254 (1), which provides:

> "Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

QUESTIONS PRESENTED FOR REVIEW

(1) In an action under the Federal Tort Claims Act, where judgment is rendered against the plaintiff on the weight of the evidence in an action against the defendant for malpractice of its treating doctors, is it prejudicial error to refuse plaintiff the right to cross-examine the government's treating doctors?

(2) In this action under the Federal Tort Claims Act, did the trial court err *in refusing* to consider or apply the doctrine of res ipsa loquitur where the undisputed evidence showed that the eleven-year-old plaintiff was under the exclusive medical control, care and treatment of the United States Government's doctors for a period of five and one-half days, at the beginning of which an appendectomy and surgical exploratory were performed which revealed no infection and at the close of which the said plaintiff was

swollen as tight as a drum with infection which was neither discovered nor treated by the said government doctors?

(3) Can defendant's medical experts express an opinion of no negligence on the part of the government doctors solely on government medical records which are incomplete because of the absence or loss of material data?

STATUTES INVOLVED

The questions presented for review in this petition involve the provisions of the Act of Congress, known as the Federal Tort Claims Act, Title 28, U. S. C. Section 1345 (b):

> "(b) Subject to the provisions of chapter 171 of this title the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or *wrongful act or omission of any employee* of the Government while acting within the scope of his office of employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." (emphasis ours)

STATEMENT OF THE CASE

Petitioners filed this action in the United States District Court for the Southern District of Ohio Under the Federal Tort Claims Act for damages resulting from alleged malpractice on the part of military doctors.

The facts reveal that the plaintiff-child was admitted at about 2:30 a.m. December 27, 1958, in defendant's military hospital with a diagnosis of acute appendicitis (App. 65a). The child's condition was not considered serious (App. 17a). The admissions' doctor did not re-examine the boy

(App. 17a). At 8:00 a.m. a young surgeon came on duty and after a cursory examination diagnosed the problem as acute appendicitis and ordered the boy to surgery. The boy's condition was obviously and markedly improved at the time the diagnosis was made. His nausea was gone; (App. 27a), he slept well; his abdominal pain was gone; he stated to defendant's nurse that he felt much better (App. 18a, 19a, 46a, 66a, 77a); his pulse had a favorable drop from 120 to 100, and his temperature returned to normal (App. 66a, 80a).

The operation revealed no appendicitis, and a surgical exploratory by this young surgeon revealed that there was no existing infection (App. 29a). The patient's condition deteriorated post-operatively with an infection that both plaintiff's and defendant's doctors agreed was a result of, and secondary to, the appendectomy (App. 54a-12, 86a, 91a, 117a, 118a). Both lower courts found that the defendant's doctors were concerned about complications that were worsening the patient's condition on the third post-operative day, December 30. (App. 135a, App. O-7). On the fourth post-operative day he was "Bloated like an eight and a half month pregnant woman" (App. 68a) or "a tight drum or balloon" (App. 51a). On the fifth post-operative day he was rushed to a local Children's Hospital for emergency treatment because of this gross infection.

The case is one of utter neglect and inexcusable fumbling. The U. S. Government defended on the ground that its operating surgeon had sufficient symptoms to warrant a decision to perform an appendectomy; that there was not sufficient evidence to cause its physicians to suspect a post-operative infection, and further that even if its doctors were negligent in the performance of their duties the rare bacteria causing the infection would not have been countered by a normally used antibiotic program.

The basis for the government's defense of its post-operative care was that its doctors never suspected an infection; yet the child was bloated like a "tight drum" with an infection. Furthermore, the defendant admitted it failed to use the routine and simple method of taking a white blood count, or any other laboratory test, to determine the absence or presence of infection. Its doctors, therefore, never administered an antibiotic to combat the existing infection.

As a result of the infection the minor plaintiff was literally butchered alive with corrective surgery costing over $12,000.00. He now has a grotesquely scarred body (App. 144a), is retarded to the extent that he cannot attend school, and is living in a society as a psychotic in need of permanent medical care and guidance.

During the trial the court refused to allow plaintiff the right to call the defendant's treating doctors as on cross examination or ask leading questions of them under the authority of Federal Rule 43 (b), (15a, 16a); the court refused to consider or apply the doctrine of res ipsa loquitur to the facts in question and allowed defendant's medical experts to render an opinion of no negligence on the part of the defendant's doctors, based solely on incomplete government medical records that failed to contain material data.

Approximately six months after the trial, the court, who, of course, sat as the trier of facts, ruled against the plaintiffs on the weight of the evidence, stating that the plaintiff failed to carry the burden of proof (App. 141a).

The plaintiffs appealed on the herein contained questions of law as assignments of error and also on the ground that the court's ruling was not based on substantial evidence. The Appellate Court adopted the opinion of the trial court and affirmed the judgment. For the sake of expediency only the three technical questions listed are presented for review.

ARGUMENT

Summary

The District Court and Appellate Court have laid down some unusual rules in important areas of trial practice which are devoid of any clear-cut precedent and which legally patternize an unprincipled procedure.

In the case at bar the said courts have laid down a rule whereby a person wronged cannot cross examine, or ask leading questions of, the wrongdoer. To disallow a claimant, such as the young plaintiff in this case, a right to cross examine the doctors who committed the negligent acts of omission and commission which proximately caused his injuries is contrary to common sense. Furthermore, such a rule technically classifies the testimony of the wrongdoer who is called by the plaintiff, as that of the plaintiff which in turn precludes impeachment.

The lower courts further ruled that the doctrine of res ipsa loquitur cannot apply in infection cases (App. 124a, 129a, 134a, App. O-7). There is little precedent by the Supreme Court which could be used in this growing area of legal practice. If the lower court's ruling would be allowed to stand there would be established a gate-way to security for medical quacks and negligent practitioners. This court should clearly rule that an inference of negligence arises where, in the terms of ordinary experience and common knowledge, certain catastrophies are so abnormal and exceptional that their very occurrence gives rise to a reasoned inference from circumstantial evidence that somebody has been negligent. A reasonably prudent medical doctor who has acted within the standard of care would have no trouble rebutting such an inference, whereas a negligent physician would, and should, have trouble getting supporting testimony.

The lower courts further ruled that medical experts could *render an opinion of no negligence on government medical records that were admittedly incomplete.* The lower courts both acknowledged that on December 30th serious complications concerning the boy's condition set in and that the defendant was aware of this (App. 135a, App. O-2). The courts further acknowledged that an important x-ray taken on this day was missing from the records along with the report of same which was always filed separately from the x-ray. With these facts the plaintiff should have been granted an inference that the x-rays and report revealed knowledge on the part of the defendant of the infectious condition. Defendant's medical experts then should have had this inference inserted in the hypothetical question that was propounded to them. Without this inference and without these vital parts of the medical records the defendant's experts had an improper foundation for opinion purposes, especially when we realize that the defendant basically defended on the ground that it never suspected an infection and that the court rendered judgment on the weight of the evidence, stating that the plaintiff failed to carry the burden of proof (App. 141a).

Question No. 1

The plaintiffs were denied the right to call defendant's treating doctors as on cross examination under Section 2317.52 of the Ohio Revised Code or for questioning under Federal Rule 43 (b) (App. 15a, 16a, 27a, 38a, 39a, 45a, 48a)

> "It is my memory that you are correct in stating that plaintiff called as witnesses the physicians at the Lockbourne Air Force Base Hospital under Rule 43 (b) and under Ohio Statute for cross examination * * * I ruled that under 43 (b) you were not entitled to cross-examine them and that the Ohio statute would have no application.

"* * * It therefore appears that the record is correct in stating that these witnesses were plaintiff's witnesses and were not being cross examined * * *. The record should also state * * * that you excepted to my ruling in this connection. * * *" (The court, App. 15a, 16a)

Testimony supporting plaintiffs' contention that they were forced to call defendants' doctors as on direct and were denied the right of cross examination is shown by the following examples or excerpts of testimony:

DR. TALLEY—(IN CHARGE OF POST-OPERATIVE CARE)—DIRECT BY PLAINTIFF:

"Q. Well, it was your opinion at the time that there was a possibility of opening the wound again, is this correct?

"MR. LONG: I object, Your Honor. The questions are now becoming leading.

"THE COURT: Objection sustained." (App. 38a)

* * *

"Q. In other words, you wouldn't have to take a culture first to get an antibiotic into a person, would you?

"MR. LONG: The question is leading, Your Honor.

"THE COURT: Objection sustained." (App. 39a)

* * *

DR. TALLEY—REDIRECT BY PLAINTIFF:

"Q. Well, now, on the first day that this child was admitted into the hospital the nurse recorded that between the time he entered the hospital and the time that he woke up in the morning that he slept well, that he had no temperature, is that correct?

"MR. LONG: Wait a minute. The question is leading, Your Honor. This is still, for the record, his witness.

"Q. O. K. What does it say? What does it say between the hours —

"MR. LONG: Could I get a ruling on my objection, please?

"THE COURT: He withdrew the question and reasked the question. He is asking the witness what the

record says, with specific reference to right after the admission, I believe." (App. 45a)

* * *

"Q. I ask you to read this paragraph right here, summary report.

"MR. LONG: Object. He is attempting to impeach his own witness.

"THE COURT: What about that, Mr. Volkema? Can you show in the summary report that Doctor Beinger did recommend antibiotics?

"MR. VOLKEMA: That is correct.

"THE COURT: Wouldn't that be impeaching this gentleman?

"MR. VOLKEMA: *I am in a peculiar position.*

"THE COURT: I understand your problem, but of course we have to comply with rules within reason, because this is a law suit. * * *" (App. 48a) (emphasis ours)

This denial of the right to cross examine the defendant's wrongdoing agents had particular application to defendant's doctors who were in control of the degree of care rendered to the minor plaintiff. Captain Strenger was the surgeon who had the management and control of the preoperative care as it related to the unwarranted operation (App. 15a, 26a, 32a, 34a). Major Talley was the surgeon who was in charge of the management and control of the post-operative care (App. 37a, 38a, 49a). In these particular instances the court stymied plaintiffs by limiting them to direct examination or by forcing them to wait for the defendant to first call the witness.

The plaintiffs should have been granted the right to cross examine the defendant's treating doctors, especially they who were in charge of the management and control of the degree of care rendered to the plaintiff, on the grounds that: (1) the defendant's doctors who were implicated in this alleged substandard of care were presumably hostile to plaintiffs' claims; (2) defendant's doctors, Captain

Strenger and Major Talley, were officers, directors or managing agents of the defendant; and (3) the defendant's doctors were its employees and agents under the Federal Tort Claims Act, through whom the negligent acts were committed; they were subject to being called as on cross-examination under the Federal Procedure which should also embrace the Ohio statute.

> "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided for in these rules. All evidence shall be admitted which is admissible under the statutes of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States Court is held. In any case, *the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules* to which reference is herein made. The competency of a witness to testify shall be determined in like manner." *Federal Rule 43 (a).*
>
> "A party may *interrogate any unwilling or hostile witness by leading questions. A party may call* an adverse party or *an officer, director or managing agent* of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by *leading questions* and contradict *and impeach him* in all respects *as if he had been called by the adverse party,* and the witness thus called may be contradicted and impeached by or on behalf of the adverse party only upon the subject matter of his examination in chief." *Federal Rule 43 (b).*
>
> "When the action or proceeding relates to a transaction or occurrence in which it has been shown or it is admitted *that the adverse party acted either in whole or in part through an agent or employee,* such agent or employee of the adverse party may be called as a witness and examined as if under cross-examination upon any matters at issue between the parties which are shown or admitted to have been within the scope of such agent's or employee's authority or employment.
>
> "The party calling for such examination should not

> thereby be concluded but may rebut such agent's or employee's testimony by counter testimony." *Ohio Revised Code, Section 2317.52* (emphasis ours)

The very thought of immunizing defendant's wrongdoing surgeons, who exclusively controlled the care and treatment of the minor patient, from being called as on cross examination is repugnant to the inner core of a principled legal procedure. Similar situations undoubtedly gave rise to the adoption of Federal Rule 43 and Ohio Revised Code, Section 2317.52. The state statute is simple, absolute, and self-explanatory. The effect of the Federal Rule is, and should be, to expand the field of admissible evidence, both as to content and procedure; it is not, and should not be, one of exclusion.

> "It provides that any evidence that was previously admissible in the federal courts or that is admissible in the courts of the state where the federal court is held may be admitted." *Federal Practice and Procedure, Volume 2B, 208, Section 961, Barron & Holtzoff*

Where the plaintiff propounds a leading question to defendant's treating doctor and the court sustains an objection thereto, the court has, in fact, precluded the plaintiff from the admission into evidence the statements of the defendant's physician as he would have relayed it under cross examination. Such testimony and evidence would have been admitted under the Ohio state law had the case been tried in the state courts and should have been admitted as a matter of right in the federal court. If there are any doubts that must be resolved in this matter, they should be resolved in favor of admissibility. *Hertz vs. Graham*. 23 F. R. P. 17 (1958); *U. S. v. Southerly portion of Bodie Island et al.*, 19 F. R. D. 313. See also *J. E. Hanger, Inc. vs. U. S.*, 160 F. 2d 8, for the proposition that cross examination is a matter of right and not a mere privilege and that

it is only after a party has had an opportunity to substantially exercise the right of cross examination that discretion of the trial judge becomes operative.

WITNESS PRESUMPTIVELY HOSTILE

It is common knowledge that a physician who is charged with rendering services below the standard of care to a patient is, by the very nature of things, presumably hostile and should be subject to being called as such by the plaintiff under Federal Rule 43 (b). Here Captain Strenger was accused of performing an unwarranted operation, and Major Talley and his associates were accused of post-operative neglect. A denial of the right to call and ask leading questions of such witnesses constitutes an abuse of discretion and should constitute prejudicial error.

See *Abdo et al. vs. Townsend et al., in Re: Talip et al.*, 282 F. 476, for the proposition that witnesses whom a party is compelled to call may be asked leading questions, *Dickson vs. U. S.*, 182 F. 2d 131, 133, for the proposition that "prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test * * *", and *U. S. v. Montgomery*, 126 F. 2d 151, 153, for the proposition that when a party has to refute the government position by eliciting testimony of government employees it is essential to ask leading questions; that they are "as proper as they are necessary," citing *3 Wigmore 3d Edition, Sec. 779.*

In the recent case of *Degelos vs. Fidelity & Casualty Co.*, 313 F. 2d 809 (5th Cir. 1963), plaintiff sued the insurance company in a direct action under the statute. Plaintiff sought to call the insured as an adverse witness under Federal Rule 43 (b) allowing use of leading questions and impeachment. The trial court only allowed plaintiff to call the insured as her own witness, making her responsible for

his testimony and denying her, in effect, a right to cross examination of a witness who, by nature, was hostile. The Appellate Court reversed holding that the instrument of cross examination is an integral part of our judicial system and the right to put leading questions to hostile witnesses is well acknowledged. Had the insured been a defendant, plaintiff's right would be clear; it is no different here.

OFFICERS AND MANAGING AGENTS

When the minor plaintiff submitted himself to the defendant for observation and surgery someone had to be in charge of the treatment and care. Two persons apparently had control of the decisions; one was Captain Strenger (App. 25a, 26a, 32a, 34a), the other was Major Talley (App. 37a, 38a, 49a). They admitted the supervision and control of the decision to operate and that post-operative care was with them and within the realm of their respective duties.

What determines a person's status as an officer or managing agent? In the case of *Steele v. Randall*, 19 F. 2d 40, the court held that a receiver of a bank is an "agent and officer of the United States." In the case of *Fall vs. Esso Standard Oil Co.*, 297 F. 2d 411, 417, the Court held that "a chief mate is so identified with interests of shipowners, as against interest of seamen, that he should be treated as a managing agent, and should be subject to cross-examination by plaintiff in an action against a shipowner for the death of a seaman, even though he is plaintiff's witness."

> "* * * The Court held that the chief mate was the plaintiff's witness and that the testimony indicated a slight variance but no hostility. We consider that the chief mate, who is in charge of the ship in the absence of the master, and was in fact in charge at the time of the fight, is in a managerial capacity and is so identified with the interest' of the shipowner as against the interest of seamen, that he should be treated as a manag-

ing agent under *F. R. Civ. R. Rule 43 (b)*, 28 U. S. C. A. Ibid 417. (Judgment reversed) Also *Klop vs. United Fruit Co. et al.*, 18 F. R. D. 310."

In the case of *Fay vs. United States*, 22 F. R. D. 28, the Court held that a captain or a chief officer in charge of a U. S. Naval vessel possesses broad and general powers to exercise his judgment and discretion in dealing with official matters.

The Court stated in *Newark Ins. Co. vs. Sartain.*, 20 F. R. D. 583, that a "managing agent * * * is any person who acts with superior authority and is to be vested with general powers *to exercise his judgment and discretion in dealing with his principals' affairs.*"

Dr. Talley was the surgeon in charge of the whole Department of Surgery. Dr. Strenger, though under Dr. Talley in the Department of Surgery, was in charge of "Ward 3" and had apparent right to, and did, exercise his sole judgment regarding the operation. Are the surgeons involved to be classified at least as captains or first mates with sufficient authority to exercise their own judgment on treating procedures? Is a ward in a hospital or the body of this little plaintiff as great as a ship?

Plaintiffs contend that there is but one reaonable deduction to be made; Captain Strenger and Major Talley were officers, directors and managing agents of the defendant under the Federal Tort Claims Act. Accordingly, they should have been subject to being called as on cross examination, both under the Federal rules and Ohio laws.

AGENTS OR EMPLOYEES

It is obvious that the defendant's treating doctors were its employees and agents. Captain Kaplan, the assisting surgeon to Captain Strenger, would not be classified as a managing agent inasmuch as he did not exercise an authority to make a final judgment on the matters contested.

However, an employee and agent he was, under the stated Tort Claims Act, and, as such, should have been subject to being called as plaintiff's witness as on cross-examination.

In proving the asserted facts *and proximate causation* the right of cross examination of the wrongdoers is an absolute essential to obtaining substantial justice.

Question No. 2

The child plaintiff was under the exclusive control of the defendant during the time in question. At the time of the appendectomy, the evidence, which includes a surgical exploratory examination, revealed that there was no existing infection (App. 22a, 29a). Four days later the boy was so infected that he had the appearance of a pregnant woman, eight months along (App. 69a), or of a tight drum (App. 51a). Both plaintiffs' and defendants' doctors testified that the infection was secondary to the operation (App. 54a-12, 86a, 91a, 117a, 118a). In other words, the infection developed and progressed to this extreme extent while under the exclusive management and control of the defendant. It is common knowledge, and all doctors so testified, that such a catastrophic result or condition following an appendectomy is not an ordinary one; in fact is very unusual and practically non-existent. Such a situation, therefore, warrants an inference of negligence, especially where no laboratory techniques were employed to determine the cause and no antibiotics were administered.

In determining whether the doctrine of res ipsa loquitur is applicable, the evidence must be viewed most favorably to the plaintiff, 39 Ohio Jurisprudence 2d 741, Section 151, and it is to be applied in circumstances where in the ordinary course of events such a happening would not have occurred had ordinary care been observed. *Glowacki vs. N. W. Ohio Ry. & Power Co.*, 116 Ohio State 451; *Fink vs. New York C. R. Co.*, 140 O. S. 1, 56 N. E. 2d 456, 459.

In the case of *Valentine vs. Kaiser Foundation Hospitals*, 194 Cal. App. 2d 282, 15 Cal. Rptr. 26 (1961) a gangrenous infection resulted following a circumcision of a two-old child which in turn resulted in the loss of the glans penis. The Court held that was sufficient evidence to justify the giving of an instruction on res ipsa loquitur.

There is a similarity between the said *Valentine* case and the instant case. Here we have an appendectomy which in turn directly caused the peritonitis. All the doctors who testified on this matter, including defendant's (App. 86a, 118a), stated that the infection was secondary to the appendectomy and that the extreme case of resulting peritonitis was most unusual. Accordingly, the plaintiff in this case is just as entitled to an inference of negligence as was the plaintiff in the *Valentine* case.

See *Moore vs. Belt*, 34 Cal. 2d 525, 212 P. 2d 509 (1949) for the proposition that an inference of negligence under the doctrine of res ipsa loquitur is applicable where *a damaging infection* sets in following an examination of plaintiff's genitourinary system which revealed that the urinary system was normal.

The exploratory examination in the instant case, as in the *Moore* case, *revealed no existing infection*; subsequently, gross infection practically killed the minor plaintiff.

See *Bradshaw vs. Wilson*, 87 O. App. 319, 94 N. E. 2d 707 (1950) for the proposition that where a fracture of a bone under the care of an orthopedic surgeon did not show evidence of healing for five months and when taken over by other surgeons reduced in two months, an inference can be drawn that there was neglect in the care given that patient by the first surgeon in charge.

Other cases are helpful to plaintiff's cause. In the case of *Horner vs. Northern Pac. Ben. Assn. Hospitals*, 382 P.

2d 518 (1963) the Washington Supreme Court held that res ipsa loquitur was applicable where an arm paralysis followed a hysterectomy. In *Davis vs. Memorial Hospital*, 376 P. 2d 561 (1962), the Supreme Court of California applied the rule where a patient suffered an abscess from an insertion of an enema tube.

There is a definite need for the Supreme Court of the United States to rule that the doctrine of res ipsa loquitur applies equally to malpractice cases under the federal law as to other cases of negligence under federal law. The Court should determine that an inference of negligence arises where in the terms of ordinary experience and common knowledge certain medical mishaps or catastrophies are so abnormal and exceptional that their very occurrence gives rise to a reasoned inference from circumstantial evidence that somebody has been negligent.

Stated in another way, this Court should clearly repudiate the lower court's reasoning that the principles controlling the doctrine as announced by this Court in other negligence actions do not apply to cases involving malpractice, that is, negligence of physicians. This is an action under the Federal Tort Claims Act; and this Court should affirm the principles set forth in the leading decisions on *res ipsa loquitur* under federal law in other negligence actions and should clearly apply those principles in this action involving malpractice, which is merely another way of stating negligence. We refer, of course, to the decisions of this Court in the leading cases of *Sweeney vs. Erving*, 228 U. S. 233; *Jesionowski vs. Boston & Maine R. R. Co.*, 329 U. S. 452; and *Johnson vs. United States*, 333 U. S. 45. Particularly pertinent is the criterion for the application of the doctrine set forth by this Court in the foregoing case of *Johnson vs. United States*:

> "No act need be explicable only in terms of negligence in order for the rule of res ipsa loquitur to be invoked.

The rule deals only with permissible inferences from unexplained events."

So here the rule should have been applied as the record reveals the basis for a permissible inference of negligence on the part of those in exclusive charge and control of the treatment of plaintiff from the unexplained, massive and unusual infection which developed and progressed without treatment during that period of control.

Question No. 3

At the commencement of the trial, and again at the conclusion of the trial, the plaintiffs renewed a previously made motion for a default judgment because defendant failed to produce a certain material part of the defendant's medical records. It was proven, at the trial, and the same was admitted by the defendant, that the defendant's hospital medical records were incomplete (App. 44a). Accordingly, the defendant made no attempt to show that the said records were complete as a predicate to its propounding a short-cut hypothetical to its medical experts (App. 104a, 105a, 106a).

DR. MEILING (DEFENDANT'S MEDICAL EXPERT)—DIRECT BY DEFENDANT:

"Q. Based upon your observation of the record, Doctor, do you find any evidence to indicate that the post-operative care of this patient was inadequate? *A.* None whatsoever.

"MR. VOLKEMA: I will object to that.

"THE COURT: Well, it is the same question. I have ruled on that.

"Q. Now, Doctor, you stated that you have reviewed this record. Can you state, sir, from your review of this record, did the staff, medical staff at Lockbourne Air Force Base do everything possible for this child, *based upon the record* as you have read it?

"MR. VOLKEMA: I will object again.

"THE COURT: What he is doing, Mr. Volkema, is asking the Doctor in effect to assume that that is what was done, *and based on that record what is his opinion.* It is a shorthand way of asking him a hypothetical question.

"MR. VOLKEMA: I think it is improper, and I would like the record to show my objection.

"THE COURT: Objection overruled. * * * (App. 105a, 106a)

DR. SASLAW (DEFENDANT'S MEDICAL EXPERT)—CROSS BY MR. VOLKEMA:

"Q. Now, Doctor, you *based your opinion, did you not, upon the records,* is that correct? You based your opinion that there was no substandard care upon the records and nothing else. *A.* That's all I could base it on.

"Q. And nothing else? *A.* That's right." (App. 113a, 114a) (emphasis ours)

The parts of the records that were missing were of utmost importance. They consisted of *an x-ray* taken on the *30th day of December,* and the *written report* of same. It was at this crucial point in the post-operative care that plaintiffs' doctors maintained that the defendant should have seriously suspected an infection (App. 74a). The trial court likewise found that the defendant was deeply concerned about the patient's condition on this day (App. 135a), and the Appellate Court also found complications on this day that were cause for alarm (App. 0-2).

It is more than coincidental that both this x-ray and the corresponding report of same were missing, both of which were relative to a time of great concern to the defendant's doctors. Did they, in fact, show probable infection? Did the report mention probable peritonitis? Plaintiffs believe they did and that, therefore, plaintiffs were entitled to an inference that the defendants had knowledge of the infection (peritonitis). Also, because of the missing parts of the medical records, the *medical*

records alone did not constitute a proper foundation for defendant's experts.

The missing parts of defendant's medical records were essential to the laying of a proper foundation for opinion testimony by defendant's experts who support defendant's contentions (1) that its treating physicians had no evidence to support a suspicion of infection, and (2) that because of this lack of evidence the course of care and treatment rendered met the accepted standard. The defendant should first be made to show that the medical record portrayed a complete picture of the medical facts that were available to the defendant's doctors and the related treatment to the minor plaintiff. However, conversely speaking, the plaintiffs, it must be remembered, could use the facts available on the record to supplement their evidence in proving negligence. In other words, while the plaintiffs could use the given facts as reported on the records to prove negligence the defendant *could not predicate an opinion of no negligence on medical records that were deficient in part where actual knowledge of the infection could have been stated or implied.*

The records were of such importance to the plaintiffs that they moved for a default judgment when the defendant failed to produce them. The Court overruled plaintiffs' motion; he refused to grant plaintiffs an inference that the missing records revealed an existing infection in the patient and he compounded the error by permitting defendant's experts to express an opinion of no negligence on the incomplete set of medical records; *a baseless hypothetical.*

> "* * * a hypothetical question must fully and fairly reflect the facts. An omission from the question of facts in evidence renders it improper, if, by reason of such omission, it manifestly fails to present the facts which it does include in their just and true relation.

Moreover, the court should reject questions which unfairly select part of the facts proved or which omit material parts." *21 Ohio Jurisprudence 2d 441, Section 430.*

"* * * It is error, though, to allow an expert to answer a hypothetical question which excludes from his consideration facts already proved by the testimony upon which the question is based when a consideration of such facts is essential to the formation of an intelligent opinion concerning the matter. Also the court should reject questions which unfairly select part of the facts proved or which omit material parts." *Squire vs. Industrial Commission, 70 N. E. 2d 95, 101.*

It is interesting to compare the grounds for the objection made by the defendant to plaintiff's hypothetical and the court's concern as to whether or not all the foundational facts were presented by plaintiff for such a question (App. 54a-3, 54a-5).

CONCLUSION—WRIT OF CERTIORARI SHOULD BE GRANTED

The Courts below compounded grave errors to preclude a fair and lawful trial under the Federal Tort Claims Act. The claimant was denied the substantial right of cross examination of doctors employed by, and agents of, the United States Government. This was an erroneous decision on a federal procedural issue of major importance. The right of a claimant under that Act to cross examine a doctor in charge of the vital function of the care and treatment of his health may well spell the difference between success and failure and justice and injustice. This is particularly so in an action for malpractice where medical information and testimony are not easily accessible, and where, because of the confidential matters involved, the essence of the medical proof must come from the testimony of the very same doctors charged with negligence.

The denial of that right, moreover, conflicts with the letter and the spirit of Rule 43 of the Rules of Federal Procedure which aims at uniformity in the scope of evidentiary matters between the federal trial court and the state court in the state where the federal court is located. The Ohio Statute permitting cross-examination of the agent of the defendant should have been recognized to the end that the claimant under the Act is at least granted the same procedural rights as other litigants in the state of the forum.

The foregoing error was compounded by the wrongful decision on an important issue of federal substantive law, namely the application of the doctrine of *res ipsa loquitur* to the evidence in this record. In deciding the central issue in this case, the negligence of defendant through its agents, the trial court refused to consider or apply that doctrine; on the contrary, that doctrine was excluded as a matter of law. This exclusion was contrary to the fundamental principles laid down by this Court calling for the application of the doctrine to the evidence in negligence actions. The lower courts would carve out exceptions to those principles and would refuse to apply them merely because this was an action for malpractice, that is, negligence on the part of physicians. This Court should clearly and forcefully correct such fundamentally unsound reasoning and make it plain that the same principles of law apply to actions involving the negligence of Government physicians under the Federal Tort Claims Act as apply to other actions involving the negligence of any other agents or persons under Federal acts or laws. Indeed, actions involving malpractice by physicians as agents of the United States in offices or hospitals owned and controlled by the Government present a particularly striking basis for the application of a reasonable inference of negligence where an extraordinary event or result occurs or follows during the

care of a patient under the control of such doctors in such hospitals. Certainly, in any event, the same principles must apply here as are applied in other negligence actions under federal law.

The erroneous *failure* of the trial court and Court of Appeals to apply the doctrine of *res ipsa loquitur* points to and dramatizes the related *affirmative* error of permitting and *accepting* expert opinion based upon admittedly *missing* medical information, where all such information and records were under the sole control and custody of the defendant United States. All inferences and implications of such incomplete records were, consequently, thrust against the plaintiff rather than against the defendant who was responsible for the missing material.

This Court should grant certiorari, correct the errors both of procedure and substance, and in unmistakable terms establish the correct rules and guidelines in actions such as this under the Federal Tort Claims Act, as well as under other similar actions involving federal law. To that end this Court should reverse the judgment below and issue a mandate ordering a new trial.

Respectfully submitted,

RUSSELL H. VOLKEMA,
44 E. Broad St., Columbus, Ohio,
Attorney for Petitioners

APPENDIX A

United States Court of Appeals for the Sixth Circuit

Andrew Cleveland Rogers III and Andrew Cleveland Rogers, Jr., Appellant vs. United States of America, Appellee.

ORDER

(Dated: July 24, 1964)

Before: Phillips and Edwards, Circuit Judges, and McAllister, Senior Circuit Judge.

Appeal from the United States District Court for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs advanced. (Rule 23 (4)

Approved for entry:

/s/ THOMAS F. MCALLISTER,
Senior Circuit Judge

COPIES OF THE PETITION FOR CERTIORARI TO OPPOSING COUNSEL:

2 copies to: Honorable Joseph P. Kinneary
United States Attorney
Columbus, Ohio

2 copies to: John W. Douglas
Assistant Attorney General
Civil Division—Department of Justice
Washington, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 536

ANDREW CLEVELAND ROGERS, III, AND ANDREW CLEVELAND ROGERS, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In this suit under the Federal Tort Claims Act, 28 U.S.C. 1346(b),[1] petitioners, a father and his minor

[1] "Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

756-742—64

son, sought damages for injuries sustained by the boy allegedly because of malpractice of government doctors in making a mistaken diagnosis of the boy's illness and providing him with ineffective pre-operative, operative and post-operative care. The district court concluded that petitioners had failed to prove either that the doctors who treated the boy were negligent or, assuming that negligence was established, that it was the proximate cause of the injuries. 216 F. Supp. 1. The court of appeals affirmed. 334 F. 2d 931.

Petitioners do not challenge these findings below. Rather, they urge that certiorari be granted to review rulings of the district court during the trial. Specifically, petitioners contend (1) that either under Section 2317.52 of the Ohio Revised Code[2] or under Rule 43(b) of the Federal Rules of Civil Procedure,[3] they

[2] "When the action or proceeding relates to a transaction or occurrence in which it has been shown or it is admitted that the adverse party acted either in whole or in part through an agent or employee, such agent or employee of the adverse party may be called as a witness and examined as if under cross-examination upon any matters at issue between the parties which are shown or admitted to have been within the scope of such agent's or employee's authority or employment."

* * * * *

[3] "A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief."

should have been permitted to call as witnesses government doctors who treated the boy and to examine them as if under cross-examination; (2) that they were entitled to an inference of negligence under the doctrine of *res ipsa loquitur;* and (3) that the government's failure to produce missing medical records (X-rays and the reports on them) entitled petitioners to a judgment in their favor or a favorable inference concerning what the records would have shown, or, alternatively, that expert witnesses for the government should not have been allowed to express an opinion based on the incomplete records available at the trial.

Of the three doctors mentioned by petitioners (Pet. 7–15) in connection with the asserted right of cross-examination under Ohio law or Rule 43(b) of the Federal Rules, two (Dr. Strenger and Dr. Kaplan) were called as witnesses by the government. Petitioners had a full opportunity to cross-examine these witnesses (see Tr., 654–691, 698–708, 714–718, 903–927)[1] and, as to them, petitioners' claim is wholly insubstantial. The third doctor (Dr. Talley) was called as a witness by petitioners early in the trial. The district court correctly ruled that the Ohio statute did not control the procedure in a federal court with respect to the scope of examination of witnesses, and that Rule 43(b) was inapplicable, since the doctor was not an "officer, director, or managing agent" of

[1] The reference "Tr." refers to the transcript of proceedings in the district court.

the government within the meaning of the rule (see P. App. 15a–16a) [5]

After a careful examination of Ohio law (see 216 F. Supp. at 2–4), the law of the place where the acts in question occurred, the district judge concluded that the doctrine of *res ipsa loquitur* was inapplicable to the facts of this case. Petitioners do not contend that this is a misinterpretation of Ohio law. Rather, citing cases from other jurisdictions, they contend that this Court should apply the doctrine as a matter of federal law. This contention is without merit. Not only was the district judge entirely correct in applying Ohio law, see Section 1346(b), *supra,* note 1; *Williams* v. *United States,* 350 U.S. 857. In addition, in a malpractice case such as this, involving a rare illness and conflicting medical opinion regarding the appropriate treatment, there is no occasion for the application of a doctrine which starts with the assumption that no injury would have occurred but for someone's negligence.

With respect to the missing medical records, petitioners' suggestion (Pet. 19) that the X-rays and reports in question were lost or concealed by government doctors is without basis in fact. The testimony

[5] The reference "P. App." refers to the appendix to petitioners' main brief in the court of appeals.

Petitioners show no ground for the examination of Dr. Talley as an "unwilling or hostile" witness pursuant to the first sentence of Rule 43(b). They point to nothing in Dr. Talley's testimony which suggests that he was a hostile witness, and at no point during his testimony did petitioners' counsel ask the court's permission to examine him as a hostile witness.

at trial was that the X-rays were sent to a private hospital where the boy was being treated after he left the government hospital and were not returned (R. App. 54b, 61b).[6] Accordingly, no presumption that the missing records contained evidence favorable to petitioners would have been proper.[7]

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

DECEMBER 1964.

---

[6] The reference "R. App." refers to the appendix to respondent's brief in the court of appeals.

[7] Two of the government doctors and petitioners' own medical witness indicated that the X-rays would have had little if any bearing on the question whether the boy's illness should have been correctly diagnosed sooner than it was, which was the only issue at stake so far as the X-rays were concerned (Tr. 63–64, 218–219, 920). The court of appeals stated: "* * * [I]t appears that, if, in the case, the missing records in question, consisting of X-rays and reports thereon, had been available at the trial, they would have been, in the light of testimony, devoid of probative value on the issue whether there were clear signs of peritonitis present on December 30 and 31, 1958, which was the only pertinent point involved in the controversy about the records." 334 F. 2d at 935–936.

U.S. GOVERNMENT PRINTING OFFICE: 1964